91-717

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

DOMINIC SENESE
JOSEPH TALERICO

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Justice Department can file a civil RICO action against an International Union, and its International Officers, not include the local unions or its membership as parties, and by settlement with the International Officers through a Consent Decree, carry out the purposes of the RICO action, take over its major executive functions, amend its Constitution to enhance disciplinary provisions of said Constitution, have veto power over appointment of Officers, and still maintain that its Court appointed administrator, who is a conceded **"quasi-governmental"** actor, performs a private function in the disciplinary expulsions of union members and that such function is not **"state action"**, thus barring Petitioners from First, Fifth and Eighth Amendment rights, merely because the settlement required the

Union to compensate said Administrator.

2. Whether the government's use of the Civil RICO Statute to eradicate union members from the union for association with other persons of Italian-American origins without regard to the commission of any offense forbidden by the RICO Statute, renders such use of the Statute a violation of the rights to **"freedom of association"** and **"due process"**, resulting in disproportionate punishment, and under the circumstances, a Bill of Attainder.

3. Where the purpose of the government's civil RICO action against an International Union is to purge from it targeted persons whom the government believes to be involved with LCN (organized crime) a **"recognizable class of persons"** on the basis of association without any showing that such Union members were involved in any violation of the RICO Statute, debarring them for life, does not

such purpose render the RICO Statute, or its use here in force and effect, a Bill of Attainder.

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IN THE
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DOMINIC SENESE
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Petitioners,

UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO: The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States

PRAYER

The Petitioners, **Dominic Senese and Joseph Talerico**, Defendant-Appellants in the Court below, respectfully pray that a Writ of Certiorari issue to review the Opinion of the United States Court of Appeals for the Second Circuit entered in this case.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Second Circuit affirming the Decision of the United States District Court for the Southern District of New York, was entered on August 6, 1991, and reported at 941 F.2d 1292, (2nd Cir. 1991) and is reproduced hereto as App. A. The District Court's Opinion is at 745 F.Supp. 908 and a Supplemental Opinion at 753 F.Supp. 1181.

CONSTITUTION

U. S. Const., Amend 1:

> **"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.**

U. S. Const., Amend V:

> **"No person shall be . . . deprived of life, liberty, or property, without due process of law; * * ***

U. S. Const., Amend VIII:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATUTES

28 U.S.C. SEC. 1254(1):

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

29 U.S.C. SEC. 504(a)(2)

"(a) Membership in Communist Party; persons convicted of robbery, bribery, etc.

"No person who is or has been a member of the Communist Party or who has been convicted of, or served any part of a prison term resulting from his conviction of, robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, or a violation of subchapter III or IV of this chapter, any felony involving abuse or misuse of such person's position or employment in a labor organization or employee benefit

> plan to seek or obtain an illegal gain at the expense of the members of the labor organization or the beneficiaries of the employee benefit plan, or conspiracy to commit any such crimes or attempt to commit any such crimes, or a crime in which any of the foregoing crimes is an element, shall serve or be permitted to serve --"
>
> * * *
>
> "(2) as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer, employee, or representative in any capacity of any labor organization."

PARTIES TO THIS PROCEEDING

The caption of this case in this Court contains the names of all parties.

JURISDICTION

The Opinion and Judgment of the United States Court of Appeals for the Second Circuit was filed on August 6, 1991. This Petition is filed within 90 days thereafter. The jurisdiction of this Court is invoked under Title 28 U.S.C. #1254(a).

STATEMENT OF THE CASE

The Proceedings Below.

On March 14, 1989, Judge Edelstein of the Southern District of New York entered a Consent Decree **(the DECREE)** settling civil racketeering charges brought by the government against the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (**"IBT"**) and members of the IBT General Executive Board. (**"GEB"**) These Petitioners and the local unions of which they were members,were not made parties to this litigation.

A central feature of the Decree was the establishment of three Court appointed offices to oversee the IBT's internal affairs pursuant to the RICO action. The Decree provided for an Independent Administrator **(the IA)** to oversee the Decree's remedial provisions. Second, it provided for an Investigations

Officer (IO) to bring charges against corrupt IBT members, and an Elections Officer to oversee the electoral process leading up to and including the election for International Officers at the 1991 IBT Convention. Finally, the Decree provided **"enhanced provisions"** for disciplinary proceedings. (See U.S. v. IBT, 905 F.2d 610 at pp. 612-13)

On November 30, 1989, the Investigations Officer charged Senese and Talerico with violating the IBT Constitution **"by conducting (themselves) in a manner to bring reproach upon the (IBT)"**. At that time Senese Age 74, an IBT member for 40 years, was the President of IBT Local 703 in Chicago and Talerico Age 74, an IBT member for 23 years, was a Business Representative for Chicago IBT Local 727.

The basis for the charges against Senese was his alleged association with La Cosa Nostra (LCN) and with certain members thereof.

The charge against Talerico was based upon his refusal to answer questions before a Federal Grand Jury investigating a skimming operation in a Las Vegas Casino in 1982 and his knowing association with one Philip Ponto, upon five occasions for about ten minutes each in Las Vegas, Nevada in 1980, a person whom the FBI contends is a LCN member. None of these alleged meetings were shown in any way to be involved with Union activity.

The IA held a Hearing on the charges against Senese and Talerico on March 22 and 23, 1990. In support of the charges the Investigations Officer relied solely upon the testimony of a Special Agent of the Federal Bureau of Investigation and an Affidavit of another Agent who did not appear to testify.

As a result of the Hearing, the IA issued a Decision finding just cause to sustain the charges against the Petitioners. As a

sanction he permanently removed Senese and Talerico from all of their IBT positions, expelled them from the IBT and prohibited them from drawing any money from the IBT or its affiliates, which would include the AFL-CIO. On July 12, 1990, the IA submitted his Opinion to the District Court (Judge Edelstein) and on August 27, 1990 the District Court issued an Opinion and Order upholding the IA's permanent expulsion of Senese and Talerico. Senese and Talerico appealed from the Orders of the United States District Court for the Southern District of New York and to the United States Court of Appeals for the Second Circuit which affirmed the orders of the District Court on August 6, 1991.

STATEMENT OF RELATED CASES AND PROCEEDINGS

Other litigation arising under the Consent Decree include the **United States** v. **IBT** a Petition for Certiorari from the Second

Circuit Court of Appeals in this Court under No. 90-1904 (filed June 24, 1991); **United States** v. **International Brotherhood of Teamsters**, 907 F.2d 277 (2d Cir. 1990).

United States v. **International Brotherhood of Teamsters**, 899 F.2d 143 (2d Cir. 1990); (Ligurotis contempt); **United States** v. **International Brotherhood of Teamsters**, 905 F.2d 610 (2d Cir. 1990);(Friedman & Hughes); **Joint Council 73** v. **International Brotherhood of Teamsters**, Case No. 89-5094 (filed December 8, 1989 D.N.J.); **U.S.** v. **IBT**, 745 F.Supp. 908 (DC S.D.N.Y.).

STATEMENT OF FACTS

This case involved the permanent expulsion of Petitioners Dominic Senese and Joseph Talerico for bringing **"reproach"** upon the Union pursuant to a provision of the IBT Constitution. (**App. 26**) The only provision for expulsion from membership in the

Constitution relates to communists, Art. II, Sec. 3(a). **(App. 27)**

All the testimony concerning the activities of the Petitioners was presented in the form of FBI Reports, FBI Physical Surveillance Reports, Statements secured from third parties in other investigations produced by a single FBI Agent deemed to be an **"expert"** by the IA and who was permitted to testify concerning his opinion as to membership in LCN. There is no evidence that any such conclusions of the FBI were ever made public, so that persons having contact with people who met the FBI **"criteria"** were on no notice that they were **"associating"** with a member of LCN. There is no evidence as to how Petitioners **"knew or should have known"** of the FBI determination of LCN members, yet, both the IA and the District Court below made such findings.

The sole evidence of the contempt charges against Talerico consisted of records from the U. S. District Court for the District of Nevada. These included documents relating to the proceedings in the civil and in the criminal contempt cases, both of which arose from the same Grand Jury out of his mere refusal to testify, and despite a grant of immunity he persisted in his Fifth Amendment rights. The order of conviction clearly indicates a plea of nolo contendere to the criminal contempt charge for which he was given a 90 Day sentence to run concurrently with the Civil Contempt. Over objection by Talerico, this document was accepted by the IA and approved by the Court below, as the sole proof of criminal contempt, notwithstanding the command of Rule 11 of the F.R. of Cr.P., which was raised at the Hearing.

Talerico was released from both civil and

criminal contempt on November 7, 1984. He served a total of 496 days.

ARGUMENT

1. STATE ACTION

In the Court below all Briefs were filed in the Second Circuit prior to June, 1991. On June 3, 1991, this Honorable Court decided Edmonson v. Leesville Concrete Co., Inc., (111 S.Ct. 2077), a **"state action"** case. The Court below referred to it in a footnote of its Opinion as **"inapposite". (App. 13)** We respectfully disagree. However, in that Court's footnote it concedes that the IA is a **"quasi-governmental actor"** but states that he was **"performing a private function under the IBT Constitution". (App. 13)**

The Court below relies on the fact that because the Decree imposes upon the IBT the requirement that it compensate the IA that therefore the IA is not a governmental actor.

(App. 13) The Court below states that the IA has offices that are provided by the IBT and that the IBT pays his salary, hence his position is under the control of the IBT and remains a private, not a governmental role. **(App. 13)** The IA's offices are located in New Jersey as are the offices of the IO.

While the Consent Decree established these positions, they are scarcely under any control of the IBT. In point of fact the IA controls all major executive functions and decisions regarding the appointment and rejection of IBT personnel.

More importantly, an analysis of the impact of the RICO suit on the IBT demonstrates that the Union is being operated by the IA under the supervision of the District Court with the United States as a party to any enforcement aspect of the Consent Decree. All matters before the District Court

relating to any phase of the operation of the IBT under the control of the IA pursuant to the Consent Decree has, as a principal party, the United States.[1]

The Court below further, at App. 12, states that the authority of the IA **"to impose the sanctions stemmed from the post-decree amendments to the IBT Constitution"**. These amendments were thrust upon the IBT by the United States and were a part of the original purpose of the RICO action, which was to rid the IBT of those whom the Justice Department or the FBI considered to be members or associates of LCN.

All amendments pursuant to the Consent Decree were made retroactive. The changes in

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[1]All appeals or remedies sought by an effected local or a member throughout the United States must be processed in the Southern District of New York under the root case, U.S. v. IBT, 88 CIV 4486 (DNE) and employ local counsel. This procedure has had a chilling effect on members aggrieved.

time limitations to bring the disciplinary actions against Senese and Talerico are critical. The membership, according to the IBT Constitution, had a right to reject any amendments.

At the Convention which occurred in June, 1991 the IBT was advised that any attempt to overrule or reject these imposed amendments would be given **"no legal effect"** by the District Court. **(App. 33-34)**

These Amendments which were imposed as a result of the Settlement can hardly be said to be the will of the membership. The settlement reflected the desire of the General Executive Board Officers to save their own positions, salaries, and benefits.

We respectfully ask this Court to take judicial notice of a pending case in this Court as of the time of the drafting of this Brief. The case is **United States of America**

v. **IBT** bearing the same caption as the case at bar. It is a Petition for Writ of Certiorari filed on June 24, 1991 and bears the No. 90-1904. Your Petitioners have examined the Brief and record in that case and wish to call the Court's attention to proceedings which occurred subsequent to the finality of judgment in this case, but are exceedingly important to the showing of State Action. The pertinent portions are reproduced herein as App. 31-34.

2. **SUBSTANTIVE CONSTITUTIONAL RIGHTS**

The Court below recognized that the key issue of this case is **"state action"**, but further erred in an offhand attempt to minimize the Constitutional violations involved without any specific response to those issues. They are real and they are substantive violations of the **"freedom of association"** and **"due process"** and a form of

disproportionate punishment recognizable under the Eighth Amendment. No disciplinary action could have been sustained except by the device employed against Petitioners.

a. First Amendment

The permanent debarment from the Teamsters Union is a penalty far beyond the purview of Title 29 U.S.C. Sec. 504. That section provides that in addition to a member of the Communist Party, no one who is convicted of robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotic laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury or a violation of certain sections of the subchapter and any felony involving abuse or misuse of such person's position or employment in a labor organization or employee benefit plan can hold a union or union related office. The LCN is

not included in that Statute. No where does it provide for any such member's debarment.

The only provision of the Teamsters Constitution which permits someone for being expelled for "**association**" is to be found in Article II, Sec. 3(A). **(App. 27)** This provision relates only to members of any party or group which advocates the overthrow of the Federal, State or Provincial Government by force and violence.

The term "**association**" as used here and the special factual circumstances of this case constitute an absolute violation of their rights under the First Amendment. See **NAACP** v. **Alabama, ex rel Patterson**, 357 U.S. 449, 460 (1958); **NAACP** v. **Alabama, ex rel Flowers**, 377 U.S. 228 (1964).

The District Court below in its Opinion stated that the Union members' First Amendment rights are curtailed by provisions of the

LMRDA, which section preserves for labor unions the right to enforce reasonable rules as to the responsibility of every member toward the organization as an **institution** and to sanction its members for conduct that would interfere with **its performance of its** legal or contractual obligations. (745 F.Supp. 908 at 912)

There was absolutely no evidence that any of the charges as to these Petitioners had anything to do with the labor organization as an institution, or in anyway interfered with the performance of its legal or contractual obligations.

b. Fifth Amendment

i. Contractual Violation

The IBT Constitution provides very specific procedures for the adoption of Constitutional Amendments. Article III, Section 9(b) **(App. 27-28)** provides that

Amendments are to be made by a majority vote of the delegates to the International Convention. This of course did not occur. The Amendments in controversy were simply adopted in the Consent Order as executed by members of the General Executive Board and by the Government in contravention of the contractual rights of the affiliates and the members.

An International Union's Constitution is an enforceable contract not only between the membership and each local union, but among all local unions and other subordinate entities and between the International Union and its affiliates. This view has prevailed in the Federal and State Courts for almost half a century, and was clearly the prevailing view at the time of the enactment by Congress of the major pieces of federal legislation regulating labor relations and unions in this

country. **United Association of Journeymen & Apprentices** v. **Local 334**, 452 U.S. 615 (1981) at pp. 619-22; **Machinists** v. **Gonzales**, 356 U.S. 617, 618-619 (1958).

The contractual nature of the IBT Constitution in this case dictates that the rights and obligations it creates cannot be removed or modified without consent of the parties. And while the International Officers with a clear conflict of interest purported to give away the rights of the members, we respectfully urge that they had no authority so to do.

Under due process it is clear that the Petitioners were deprived of substantial liberty and property interests within the meaning of the Fifth Amendment, as the Union Constitution are enforceable as contracts.

ii. Right of Confrontation

Both Petitioners were deprived of the

right of confrontation, as the only person who testified live was FBI Agent Wacks who was permitted to give hearsay testimony and hearsay upon hearsay testimony. The situation here is a clear violation of this Court's ruling in **Greene** v. **McElroy**, 360 U.S. 474, 493, 496-500, 507-508 (1959) The testimony in addition to inadmissible hearsay includes statements by deceased witnesses, newspaper reports, documents, such as FBI Reports which themselves are inadmissible hearsay documents, in which further contained layers of inadmissible hearsay from other sources named and unnamed. Not one piece of evidence was presented by a live witness subject to cross-examination who had personal knowledge of any of the charges made against them. Contrary to the opinion of the Court below, Petitioners do contest the reliability of the evidence admitted during the proceedings, over

strenuous objections.

iii. Vagueness

Due process requires notice that certain conduct is prohibited and will subject a person to sanctions. The proceedings show that the FBI used a definition of LCN membership known only to itself. See testimony of Wacks. **(App. 29)** How is anyone to know that **"association"** with persons secretly designated by the FBI brings **"reproach"** upon the IBT. On what basis did the Courts below find **"knew or should have known"** that such a person was a member of the LCN. There is no basis asserted.

The vagueness of the term **"association"** when coupled with the terms **"to bring reproach upon the union"** have never been interpreted. The words to bring **"reproach upon the union"** have no meaningful standard. The only interpretation even made was offered by the

General Executive Board on November 1, 1989 and was rejected by both the IA and the Court below.

These matters raise substantive questions of **"due process"**.

iv. Retroactive Application

The stated policy of the IBT to be free from the influence of organized crime was language which was inserted into the Consent Decree entered into in 1989. How can the prospective nature of a Consent Decree prohibit conduct which occurred at a time which precedes the Decree. The time period for Senese was 1984, but the time period for Talerico was 1980 for the **"association"**, and the contempt hearings in 1982 and 1984.

Consent Decrees are prospective in nature as the prohibitions **"permanently enjoin * * * knowingly associating with any member or associate * * * of the Cosa Nostra"** The cases

cited by the government, the Decision of the IA and the Court below, in support of the retroactive effect of the orders of debarment, relate to parole and license cases where clear notice is given as to parolee conduct before release, which is prohibited, or past conduct which renders an applicant for a license ineligible.

c. Eighth Amendment

The Eighth Amendment not only prohibits punishments deemed barbarous and inhumane, but also condemns punishments which by their excessive severity are greatly disproportionate to the "offense" charged.

The question as to whether the proceedings are civil or criminal focuses on the nature of the sanctions imposed.

This Court has distinguished criminal from civil proceedings on the basis of a distinction between "punitive" and "remedial"

statutes. While Courts will not deem a statute criminal if its purpose is to treat, rather than to punish, civil RICO provisions are not an effort to provide **"treatment"** for racketeers in the same way that mentally ill or sexually dangerous persons are. Rather Section 1964 is an effort to find yet another way to punish those who have participated in what the Justice Department deems to be Organized Crime.

Any violation of the Court's Order is punished by criminal contempt as the District Court has assumed absolute plenary powers over all locals and all members throughout the United States. The Order appears to debar Petitioners as consistent with the power of the IBT to expel a member, but the order is much broader. The order also bars them from drawing any money or compensation from any other IBT affiliated source. An affiliated

source is the AFL-CIO.

The sanctions here are punitive in nature and not only involved forfeiture, but a **"blackballing"** of them totally out of the labor field. The assertion that the IBT Constitution disciplinary provisions are merely being invoked as to these Petitioners cannot be seriously argued. These sanctions argue for the proposition that **"state action"** is involved and that the whole proceedings takes aim at an **"identifiable group"** of persons, Italian-American members of the IBT, whose mere association or non-union related acquaintances with members of the Italian-American community in Chicago is sufficient to bring about the aims of the Congress in the enactment of RICO.

Petitioner Talerico was further punished for his persistence upon maintaining his right to remain silent and that is an abusive use of

prosecutive power. It is also contrary to a long list Supreme Court authorities on the subject.

REASONS FOR GRANTING THE WRIT

This Court should grant Certiorari in order to determine an important question of law as to whether government can use the Federal Civil Rico Statute to deprive persons in the labor movement throughout the United States, including, but not limited, to other members of the International Brotherhood of Teamsters, the Hotel Employees and Restaurant Employees International, the Laborers International, and the Longshoremen International of a **"liberty interest"** in violation of the First, Fifth and Eighth Amendments to the Constitution.

This Court should also grant Certiorari to determine whether the use of the Federal RICO Statute, which has targeted Italian-

American members of said Unions as members or associates of LCN, without reference to any offense alleged under the RICO Statute, constitutes a Bill of Attainder.

CONCLUSION

Petitioners do not contest the salutary aims of the Justice Department in their efforts to rid unionism of criminal element or such persons whose positions in the labor movement have disclosed violations of labor laws which were designed to protect the membership from dishonesty by their representatives. It is, after all, the goal of the Justice Department. But let not such riddance be effectuated by a total disregard for due process. It ought not be under a form of McCarthyism in which to accuse without Constitutional protections is sufficient to deprive such targets of **"liberty interests"**.

WHEREFORE, for the above and foregoing

reasons, Petitioners respectfully pray that this Honorable Court issue its writ of certiorari to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

App. 1

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1642 -- August Term, 1990

(Argued June 7, 1991 Decided Aug -6 1991)

Docket No. 91-6052

United States of America,
Plaintiff-Appellee,

v.

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, The Commission of La Cosa Nostra; Anthony Salerno, also known as Fat Tony; Matthew Ianniello, also known as Matty the Horse; Anthony Provenzano, also known as Tony Pro; Nunzio Provenzano, also known as Nunzi Pro; Anthony Carollo, also known as Tony Ducks; Salvatore Santoro, also known as Tom Mix; Christopher Furnari, Sr., also known as Christie Tick; Frank Manzo; Carmine Persico also known as Junior, also known as the Snake; Gennaro Langella, also known as Gerry Lang; Philip Rastelli, also known as Rusty; Nicholas Marangello, also known as Nicky Glasses; Joseph Massino, also known as Joey Massina; Anthony Ficarotta, also known as Figgy; Eugene Boffa, Sr.; Francis Sheeran; Milton Rockman, also known as Maishe; John Tronolone, also known as Peanuts; Joseph John Aiuppa, also known as Joey O'Brien, also known as Joe Doves, also known as Joey Aiuppa, John Phillip Cerone, also known as Jackie the Lackie, also known as Jackie Cerone; Joseph Lombardo, also

known as Joey the Clown; Angelo LaPietra, also known as the Nutcracker; Frank Balistrieri, also known as Mr. B; Carl Angelo DeLuna, also known as Toughy; Carl Civella, also known as Corky; Anthony Thomas Civella, also known as Tony Ripe; General Executive Board, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Jackie Presser, General President; Weldon Mathis, General Secretary-Treasurer; Joseph Trerotola, also known as Joe T; Robert Holmes, Sr.., Second Vice President; William J. McCarthy, Third Vice President; Joseph W. Morgan, Fourth Vice President; Edward M. Larson, Fifth Vice President; Arnold Weinmeister, Sixth Vice President, John H. Cleveland, Seventh Vice President; Maurice R. Schurr, Eighth Vice President; Donald Peters, Ninth Vice President; Walter J. Shea, Tenth Vice President; Harold Friedman, Eleventh Vice President; Jack D. Cox, Twelfth Vice President; Don L. West, Thirteenth Vice President; Michael J. Riley, Fourteenth Vice President; Theodore Cozza, Fifteenth Vice President; Daniel Ligurotis, Sixteenth Vice President; Salvatore Provenzano, also known as Sammy Pro, Former Vice President,

Defendants,

DOMINIC SENESE AND JOSEPH TALERICO,

Respondents-Appellants.

Charles M. Carberry,
Investigations-Officer-Appellee.

Before OAKES, Chief Judge, PRATT and ALTIMARI, Circuit Judges.

Appeal from orders of the United States District Court for the Southern District of New York, David N. Edelstein, Judge, upholding internal union disciplinary sanctions imposed upon appellants.

Affirmed.

Patrick J. Calihan, Chicago, IL, (Edward J. Calihan, Jr., John Toomey, of counsel), for Respondents-Appellants.

Peter C. Sprung, New York, NY (Otto G. Obermaier, United States Attorney for the Southern District of New York, Edward T. Ferguson, III, of counsel), for Plaintiff-Appellee United States of America.

Charles M. Carberry, New York, NY, Investigations Officer-Appellee. Pro se.

OAKES, Chief Judge:

Dominic Senese and Joseph Talerico, former members of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO ("IBT") and former officials of IBT-affiliated local unions, appeal from orders of the United States District Court for the Southern District of New York, David N. Edelstein, Judge, upholding internal union disciplinary sanctions imposed on them by reason of, among other things, their association with organized crime. For the reasons set forth below, we affirm.

BACKGROUND

On March 14, 1989, Judge Edelstein entered a consent decree (the "Decree") settling civil racketeering charges brought by the Government against the IBT and members of the IBT General Executive Board. The Decree

has already engendered a staggering amount of litigation, and, as a result, we have had many occasions to discuss in detail the nature of the underlying racketeering charges and the contents of the Decree itself. See, e.g., United States v. International Broth. of Teamsters, 931 F.2d 177 (2d Cir. 1991). In our discussion here, therefore, we provide only a brief background of the facts giving rise to this particular appeal.

A central feature of the Decree was the establishment of three Court-appointed offices which were designed to oversee the IBT's internal affairs. First, the Decree provided for an Independent Administrator (the "IA"), to oversee the Decree's remedial provisions. Second, it provided for an Investigations Officer, to bring charges against corrupt IBT members. Finally, it established an Elections Officer, to oversee the electoral process

leading up to and including the election for International Officers at the 1991 IBT Convention.

In separate charges filed on November 30, 1989, the Investigations Officer charged Senese and Talerico with violating the IBT Constitution "by conducting [themselves] in a manner to bring reproach upon the [IBT]."[1] At that time, Senese was the President of IBT Local 703 in Chicago, and Talerico was a business agent for Chicago IBT Local 727. The basis for the allegations against Senese was his association with La Cosa Nostra and his knowing association with La Cosa Nostra

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[1]Article II, section 2(a) of the IBT Constitution requires every IBT member to affirm that he will, inter alia, "conduct himself . . . at all times in such a manner as not to bring reproach upon the Union." Article XIX, section 6(b)(2) of the IBT Constitution provides that "[v]iolation of oath of office or of the oath of loyalty to the Local Union and the International Union" is a basis for union disciplinary charges.

members Joseph Aiuppa and John Cerone. The charges against Talerico were premised upon his unlawful refusal to answer questions before a federal grant jury investigating the skimming of money from a Las Vegas casino, and his knowing association with La Cosa Nostra members Joseph Aiuppa and Philip Ponto.[2]

The IA held a hearing on the charges against Senese and Talerico on March 22 and 23, 1990. In support of the charges, the Investigations Officer relied principally on the oral testimony and written declaration of Peter J. Wacks, a Special Agent of the Federal Bureau of Investigation ("FBI"), as well as the declaration of FBI Special Agent Charlie J. Parsons. The Wacks and Parsons

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[2]The Investigations Officer also charged Chicago IBT Local 786 employee James Vincent Cozzo with conducting himself in a manner to bring reproach upon the IBT. Cozzo did not appear at the hearing, however, and the Investigations Officer therefore proceeded against him in his absence.

declarations summarized voluminous evidence concerning Senese and Talerico and their involvement with the Chicago La Cosa Nostra family, and contained extensive supporting documentation.

On July 12, 1990, after reviewing the hearing record and post-hearing memoranda submitted by counsel, the IA issued a 42-page opinion concluding that there was just cause to sustain each of the charges against Senese and Talerico. As a sanction, the IA permanently removed Senese and Talerico from all of their IBT positions, expelled them from the IBT, and prohibited them from drawing any money from the IBT or its affiliates.[3]

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[3]The Independent Administrator also concluded that there was just cause to sustain the charge against Cozzo and imposed the same sanction on him. Cozzo did not appeal to the district court, however, and his case is therefore not before us.

On July 12, 1990, the IA submitted his opinion to the district court, seeking review of his decision on the disciplinary charges against Senese and Talerico. On August 27, 1990, the district court issued an opinion and order upholding the IA's permanent bar of Senese and Talerico, but remanding the case for the IA to determine the proper treatment of Senese's health and welfare benefits.[4] See 745 F.Supp. 908. On remand, the IA issued a supplemental opinion terminating Senese's IBT-related employees benefits. On December 29, 1990, the district court affirmed this supplemental opinion in all respects. See 753 F. Supp. 1181.

Senese and Talerico now appeal from the district court's August 27 and December 29, 1990 orders.

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[4]Talerico represented to the Independent Administrator that he had no continuing IBT-related employee benefit coverage.

DISCUSSION

Senese and Talerico argue that the IA's imposition of sanctions violated their First, Fifth, and Eighth Amendment rights under the United States Constitution. In addition, Senese argues that the termination of his IBT-related benefits violated both the terms of the Decree and the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. Sec. 1001, et seq. (1988). We reject Senese and Talerico's constitutional challenges on two grounds. First, we believe that the IA's imposition of sanctions did not constitute "state action," and that, as a result, the constitutional provisions that Senese and Talerico cite do not apply. Second, even assuming that the IA's conduct did constitute state action, we believe that his decision comported with all the constitutional provisions that might conceivably apply.

Accordingly, because we also believe that the IA's termination of Senese's employee benefit plans was proper, we affirm.

A. Constitutional Claims

1. State Action

Because the United States Constitution regulates only the Government, not private parties, a litigant claiming that his constitutional rights have been violated must first establish that the challenged conduct constitutes "state action." See, e.g., Blum v. Yaretsky, 457 U.S. 991, 1002 (1982). To qualify as state action, the conduct in question "must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible," and "the party charged with the [conduct] must be a person who may fairly be said to be a state actor." Lugar v. Edmondson

Oil Co., 457 U.S. 922, 937 (1982). The IA's imposition of sanctions on Senese and Talerico meets neither of these criteria.

First, in sanctioning Senese and Talerico, the IA acted pursuant to the IBT Constitution -- a private agreement -- and not pursuant to a "right or privilege created by the State." Id. Thus, the charges he brought were premised on violations of Article II, section 2(a) of the IBT Constitution, not on violations of any federal or state law. Similarly, the IA's authority to impose the sanctions stemmed from the post-Decree amendments to the IBT Constitution, which established the IA and empowered him to oversee the IBT's internal disciplinary affairs, see United States v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers, AFL-CIO, 905 F.2d 610, 622 (2d Cir. 1990), and not from any provision of

federal or state law. Thus, Senese and Talerico fail to satisfy the first element of the definition of state action set forth above.[5]

Senese and Talerico are also unable to establish that the IA "may fairly be said to be a state actor." Lugar, 457 U.S. at 937. The IA has offices that are provided by the IBT, and the IBT pays his salary. Thus, the position is under the control of the IBT, and remains a private, not governmental, role.

In attempting to convince us that the IA is a governmental actor, Senese and Talerico

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[5]Edmondson v. Leesville Concrete Co., Inc., 111 S.Ct. 2077 (1991), where the Court held that a private party exercising peremptory challenges in a civil case to exclude jurors on account of race was a state actor because of legislative establishment of, and judicial supervision over, the jury system and juror selection process, id. at 2084-85, is inapposite. There the Court was dealing with private actors performing governmental functions while here we have the IA, a quasi governmental actor, performing private functions under the IBT Constitution.

emphasize that the IA was established to settle a lawsuit brought by the Government, and that the district court appointed the IA and continues to oversee his affairs. This argument misses the point. The question is not whether the decision to establish the IA was state action, but rather whether the IA's decision to sanction Senese and Talerico may be "fairly attributable" to the Government. Id.; see also Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1968) (Friendly, J.) ("[T]he state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury.") (emphasis added). Because the IA's decision to sanction Senese and Talerico was guided only by the IBT Constitution, and not by any state or federal authority, Senese and Talerico's characterization of the IA's decision-as state

action must fail.

Our conclusion that the IA's imposition of sanctions did not constitute state action comports with the Supreme Court's decision in Blum v. Yaretsky, 457 U.S. 991 (1982), and Rendell-Baker v. Kohn, 457 U.S. 830 (1982). In Yaretsky, for example, the Court concluded that a private nursing home's decision to transfer and discharge patients to lower cost facilities was not state action, despite the fact that State regulations "encouraged" the homes to transfer patients to "lower levels of care," because the ultimate decision to transfer was based on "medical judgments made by private parties according to professional standards that are not established by the State." 457 U.S. at 1008 & n.19. Likewise, in Rendell-Baker, the Court found that a private school's decision to fire one of its teachers was not state action, even though the school

was extensively financed and regulated by the State, because the ultimate decision to discharge the teacher was not "compelled or even influenced by state regulation." Rendell-Baker, 457 U.S. at 841. These cases, we believe, indicate that governmental oversight of a private institution does not convert the institution's decisions into those of the State, as long as the decision in question is based on the institution's independent assessment of its own policies and needs. See Albert v. Carovano, 851 F.2d 561, 570-71 (2d Cir. 1988) (en banc) (holding that private university's decision to discipline students was not attributable to the State, even though State required university to establish disciplinary policy, where decision to discipline particular students was based on university's independent assessment of its own needs). Thus, because the IA's decision to

sanction Senese and Talerico was based on the policies and procedures embodied in the IBT's own Constitution, and not on state or federal law, the decision was not state action, and Senese and Talerico's constitutional claims must fail.

2. Substantive Constitutional Rights

Even if the IA's conduct did constitute state action, our result today would be the same, as Senese and Talerico's constitutional claims are entirely without merit.

a. First Amendment

Senese and Talerico argue that the disciplinary sanctions imposed on them violated their First Amendment right to freedom of association, because the sanctions were based in part on their voluntary associations with members of La Cosa Nostra. However, it is well established that an individual's right to freedom of association

may be curtailed to further significant governmental interests. See e.g., United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, AFL-CIO, 413 U.S. 548, 567 (1973) (upholding ban on political activity by union employees). Because the public has a compelling interest in eliminating the "'public evils' of 'crime, corruption, and racketeering'" in union activity, Brown v. Hotel & Restaurant Employees and Bartenders Int'l Union Local 54, 468 U.S. 491, 508 (1984) (citation ommitted), the IA was fully justified in sanctioning Senese and Talerico for their knowing association with organized crime here. Accord Hotel & Restaurant Employees Local 54 v. Read, 597 F. Supp. 1431, 1446-51 (D.N.J. 1984) (rejecting claim that New Jersey Casino Control Commission's order requiring removal of union officials based upon their organized crime associations

violated First Amendment right to freedom of association), aff'd mem., 772 F.2d 893 (3d Cir. 1985).

b. Fifth Amendment

Senese and Talerico also claim that the IA's imposition of sanctions violated their Fifth Amendment right to due process. First, they claim that they were denied due process because they were disciplined under procedures contained in a consent decree to which they were not parties. Our prior opinion in United States v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers, AFL-CIO, 931 f.2D 177 (2d Cir. 1991), however, clearly establishes that the IBT leadership adequately represented the interests of the IBT membership in negotiating and adopting the Decree. See id. at 184-87. As such, the fact that Senese and Talerico were not signatories to the Decree is no bar to binding them to the

Decree's terms.

Senese and Talerico also claim that they were denied due process because, until the Decree was adopted, it was not clear that association with members of organized crime was prohibited. This argument is meritless. As Judge Edelstein noted, the Decree did not create new standards of conduct for IBT members, but simply made explicit the longstanding goal of the IBT to be free of corruption. See 745 F. Supp. at 913. As such, the IA's sanctioning of Senese and Talerico for their pre-Decree associations with organized crime did not violate due process.

In addition, Senese and Talerico contend that they were denied their right to confront and cross-examine the witnesses against them. This claim rests principally on the fact that much of the evidence introduced at their

hearing was in the form of hearsay. However, procedural due process does not require rigid adherence to technical evidentiary rules in administrative hearings, as long as the evidence introduced is reliable. See, e.g., Richardson v. Perales, 402 U.S. 389, 402 (1971) (upholding introduction in administrative hearing of hearsay medical reports, based on reports' reliability). Thus, because Senese and Talerico do not dispute that the admitted evidence was reliable, their reliance on the Due Process Clause must fail.

Finally, Senese and Talerico claim that the offense for which they were sanctioned -- bringing "reproach" upon the union -- was unconstitutionally vague. However, even if a regulation may be vague in certain hypothetical applications, it may still constitutionally be applied to conduct that

unquestionably falls within its terms. See Parker v. Levy, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness."); See also Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 n.7 (1982). Thus, because it should have been clear to Senese and Talerico that associating with known members of organized crime would bring reproach upon the IBT, sanctioning them for these activities was not constitutionally infirm.

c. Eighth Amendment

Senese and Talerico also claim that the sanctions imposed on them constitute "cruel and unusual punishment" in violation of the Eighth Amendment. This claim is entirely without merit. The Eighth Amendment applies only to punitive sanctions, see Browning-

Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 262 (1989) (noting that the Eighth Amendment has been understood "to apply primarily, and perhaps exclusively, to criminal prosecutions and punishments"), not to the sort of remedial sanctions imposed on Senese and Talerico here. In any event, given that neither death nor incarceration was imposed, Senese and Talerico's reliance on the Eighth Amendment is unfounded.

B. Senese's Benefits

Senese also argues that the IA's decision to prevent him from taking a lucrative severance package from IBT Local 703, and to prevent the Local from making any further contributions on Senese's behalf to any IBT-affiliated benefit plan, violated both the Decree and ERISA. We disagree.

Senese's claim that the termination of his Union and health and welfare benefits

violated the terms of the Decree is groundless. Cutting off Senese's benefits served the Decree's objective of severing ties between the IBT and organized crime. As for Paragraph 20, which Senese contends precludes the IA from terminating his benefits, that provision, by its terms, applies only to the Government, and not to court-appointed officers such as the IA. Paragraph 20 also clearly states that it applies only to the union defendants in the underlying civil RICO action, and not to individuals such as Senese.

Senese's argument that the termination of his benefits violated ERISA is simply unfounded. The anti-alienation provision of ERISA, on which Senese relies, applies only to ERISA pension benefits, not to ERISA welfare benefits. See Mackey v. Lanier Collections Agency & Serv. Inc., 486 U.S. 825, 836 (1988). Because the district court correctly

characterized the benefits here as health and welfare benefits -- a characterization Senese does not challenge -- ERISA does not apply.

Accordingly, the orders of the district court are affirmed.

APPENDIX B

App. 26

Pertinent portions of the IBT Constitution, Art. II, Sec. 2(a) and Sec. 3(a) read in part: (See underlined portion)

> "Section 2(a). Any person shall be eligible to membership in this organization upon compliance with the requirements of this Constitution and the rulings of the General Executive board. Each person upon becoming a member thereby pledges his honor: to faithfully, observe the Constitution and laws of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and the Bylaws and laws of his Local Union; to comply with all rules and regulations for the government of the International Union and his Local Union; to faithfully perform all the duties assigned to him to the best of his ability and skill; <u>to conduct himself or herself at all times in such a manner as not to bring reproach upon the Union;</u> to take an affirmative part in the business and activities of the Union and accept and discharge his responsibilities during any authorized strike or lockout; that he will not divulge to nonmembers the private business of the Union unless authorized to reveal the same; to never knowingly harm a fellow member; to never discriminate against a fellow worker on account of race, color, religion, sex, age, or national origin; to refrain from any conduct that would interfere with the Union's performance of its legal or

contractual obligations; and at all times to bear true and faithful allegiance to the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and his Local Union." (emphasis supplied)

* * *

"Section 3(a). No person who actively advocates the overthrow of a federal, state or provincial government by force or violence, or is a member of any party or group and knows of and actively advocates its purpose to overthrow a federal, state of provincial government by force or violence, shall be allowed to hold membership in the International Union or any of its subordinate bodies. If any such person obtains Union membership, or after having been admitted to Union membership advocates the overthrow of a federal, state or provincial government by force or violence, or becomes a member of a party or group and knows of and actively advocates its purpose to overthrow a federal, state or provincial government by force or violence, he shall be expelled from membership upon the filing of charges and the conduct of a trial in accordance with the applicable procedures set forth in Article XIX."

Also pertinent is Art. III, Sec. 9(b) which reads as follows:

"(b) Amendments to the Constitution and all other action of the Convention

shall be adopted by a majority vote of the delegates present, seated and voting at the time of submission of the amendment or other proposed action to the Convention. Amendments shall become effective immediately upon their adoption unless otherwise specified in any particular amendment adopted by the Convention."

APPENDIX C

App. 29

Pertinent portions of the testimony of FBI Agent Peter Wacks reads as follows: (Tr. 53-54)

* * *

"Q of your -- No, I am sorry. Let me back up. At page 9 of your affidavit I note that in (n) 'Philip Ponto was a member of the Chicago Outfit.' Do you see that in there?

"A Yes, sir.

"Q How do you know that?

* * *

"A It was a question that was posed to Mr. Fratianno by another Agent, Emmet Michaels, who was assigned to the Las Vegas office at the time. And Mr. Fratianno identified Mr. Ponto as a member of the La Cosa Nostra family.

"Q Didn't you tell me that all these surveillances and so forth were sent to the central office?

"A Well, what typically happens to qualify an individual as a LCN member is I am as an investigator in that particular office once you accumulate identifications either by another LCN member or by any other type of criteria that is set up by headquarters you put a package together, send it back to our headquarters in Washington and they make the determination as to include him as a member.

"Q Then the determination as to whether or not someone is a member is made by your office in Washington?

"A In headquarters. They establish the criteria and we --

* * *

"A -- we focus our investigations to try and satisfy that criteria.

APPENDIX D

App. 31

Rule 11, F.R.of Cr.P., reads in pertinent part:

"(6) **Inadmissibility of Pleas, Plea Discussions, and Related Statements.** Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

* * *

"(B) a plea of nolo contendere;

APPENDIX E

App. 32

Pertinent portions of the Petition for Certiorari in United States v. IBT, 90-1904 filed on June 24, 1991, in the Questions Presented and at pp. 31-32 of said Petition are as follows:

"1. Did the Court of appeals err when it affirmed the District Court Order which effectively grants the Government control of the IBT in perpetuity?

"a. Did the court of appeals err when it affirmed the District Court Order which declared that paragraph L.17 of the Consent Decree, which requires Government approval of changes to the IBT Constitution, is a permanent amendment to the IBT Constitution regardless of the vote of the delegates at the Convention.

"b. Did the court of appeals err when it affirmed the District Court Order making all other amendments contained in the Consent Decree permanent amendments to the IBT Constitution.

"c. Did the court of appeals err when it affirmed the injunction issued by the district court, the effect of which is to require the delegates to the Convention to vote on the amendments contained in the Consent Decree while at the same time declaring that vote meaningless."

* * *

"The parties intend the provisions set forth herein to govern future IBT practices in those areas. To the extent the IBT wishes to make any changes, constitutional or otherwise, in those provisions, the IBT shall give prior written notice to the . . . [Government], through the undersigned. If the . . . [Government] then objects to the proposed changes as inconsistent with the terms and objectives of this . . . [Consent Decree], the change shall not occur; provided, however, that the IBT shall then have the right to seek a determination from the Court, or after the entry of judgment dismissing this action, from this Court or any other federal court of competent jurisdiction as to whether the proposed change is consistent with the terms and objectives set forth herein."

* * *

" - the express provisions of the Consent Decree require a vote (A. 63-64, 78-83, and 97);

" - the delegates to the Convention were elected pursuant to procedures implemented and supervised by the Elections Officer (A.66-97);

" - the Consent Decree explicitly recognizes the membership's Landrum-Griffin free speech rights (A. 63-64; see also, U.S.Const., Amend I, 29 U.S.C. Sec. 411(a)(1) and (2));

" - Article III, Section 9(b) of the IBT Constitution requires that 'Amendments to the Constitution . . . shall be adopted by a majority vote of the delegates . . ." (IBT Constitution, p.20); and

" - paragraph 9(b) of the Consent Decree preserves the Government's right to seek 'any appropriate action' if the IBT has not formally amended its Constitution to conform to the terms of the Consent Decree by the completion of the 1991 Convention" (A. 63-64)

* * *

On May 6, 1991, the district court convened a hearing for the purpose of informing the parties that it had issued an opinion on the Government's motion. From the bench the court stated:

> "'I have determined that as a result of decisions in the past two years, it has been settled that the IBT had the power to bind the entire union to the [C]onsent [D]ecree's changes in the IBT Constitution without a vote of the delegates to a convention. Therefore, the vote of the delegates on the [C]onsent [D]ecree to be taken at the 1991 convention will now have no legal effect.

"(A. 111-112.) The Court then issued a written Opinion & Order to that effect. (A.7-54.)"